88-1860

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Is the defendant in a civil action under Title VII of the Civil Rights Act of 1964, as amended, entitled to summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure upon its assertion that the plaintiff's job performance has been inadequate, despite a detailed rebuttal of this assertion by the plaintiff?

2. Is the defendant in a civil action under Title VII of the Civil Rights Act of 1964, as amended, entitled to summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure when it has objected to the plaintiff's discovery requests and a motion to compel discovery is pending?

PARTIES TO THE PROCEEDING

Petitioner Ping L. Ku was the Plaintiff in the District Court, and Appellant in the Court of Appeals for the Fourth Circuit.

Respondent Allied-Signal, Inc., was the Defendant in the District Court, and Appellee in the Court of Appeals.

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IN THE

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OCTOBER TERM, 1988

No. 88-

PING L. KU,

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v.

ALLIED-SIGNAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Ping L. Ku petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit (App. 1a) was entered on December 30, 1988. The Opinion is

not reported. The Opinion of the United States District Court for the Eastern District of Virginia of July 20, 1988, granting summary judgment for Respondent Allied-Signal, Inc. (App. 6a), is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1988. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was denied by Order of February 3, 1989 (App. 3a).

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

Relevent portions of the provisions of Title 42, United States Code and of the Federal Rules of Civil Procedure appear in the Appendix, at pp. _____.

STATEMENT OF THE CASE

Ping L. Ku is a chemical engineer, a naturalized citizen of the United States, and a native of China. He has over 20 years experience in polymer syn-

thesis. In August, 1984, Ku submitted his resume in response to an advertisement placed by Allied-Signal, Inc., for a position as a Research Engineer in polymer science at Allied's Technical Center in Petersburg, Virginia.

Ku was initially interviewed for this position in September, 1984, and was interviewed again in December, 1984, as one of the final candidates for the position. Ku was offered the position and accepted it at an annual salary of $40,200. He began his employment with Allied effective February 11, 1985.

When Ku began his employment, he was supervised by Charlie Cole, Manager of the Applied Research Group. Cole's supervisor was Alan Francario, Manager of the Product Development Department. Francario was replaced during 1985 by Ed Duffy. Duffy's immediate superior was Ray Biron, Director of Technical and Commercial Development.

Until December 10, 1985, Cole did not express any dissatisfaction with Ku's work (Ku Affidavit, ¶

5). Then, on December 10, 1985, Cole presented Ku with an evaluation which was very critical of Ku's performance. Allied has never offered any explanation of the timing of the December 10, 1985 evaluation, which was neither a six-month evaluation or an annual evaluation. Ku was not asked to comment on the evaluation or to provide any input to the evaluation whatsoever. When Ku inquired of Cole why he had written such a negative evaluation, Cole replied that he was told to do so by his supervisor, Duffy.

In his December 10, 1985 evaluation, Cole offered criticism of four of the nine projects which had been assigned to Ku, while indicating that Ku's performance on three other projects had met or exceeded Cole's expectations (Ku Affidavit, ¶ 5,6). Cole also produced a "3 Month Action Plan" which he said was developed to help Ku improve his effectiveness.

In late 1985, Allied implemented a "census/cost reduction program" in which the various sectors of

the corporation were to identify positions which could be eliminated without adversely affecting business operations. This program provided enhanced severance benefits to the persons whose positions were eliminated. Ku's position was selected for elimination under this program. At that time, Ku was the only employee in his group of Asian/Chinese national origin, and the only employee in his department singled out for termination under the census/cost reduction program.

On December 12, 1985, Duffy and Cole met with Ku and informed him that his position was being eliminated under the census/cost reduction program. The enhanced severance benefits offered by the census/cost reduction program gave Ku sufficient credit for a pension of $600 per month from Allied, which he received. Ku was removed from his position on January 31, 1986.

Ku filed a complaint of discrimination against Allied with the Equal Employment Opportunity Commission, and in due course received a Notice of

Right to Sue. He filed the present action in the United States District Court for the Eastern District of Virginia under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., alleging that Allied discriminated against him on the basis of his race when it eliminated his job and terminated his employment. The District Court's jurisdiction over this complaint is grounded in 28 U.S.C. §§ 1331 and 1343.

Allied filed a motion for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure, relying on the deposition given by Ku and an affidavit provided by Biron. No affidavit from either Cole or Duffy was presented. At the time the motion for summary judgment was filed, Allied had not produced many of the documents which Ku had requested in discovery, and a motion to compel discovery was pending. Ku objected to the Court's consideration of the motion for summary judgment while this discovery matter was pending (Memoran-

dum in Opposition to Motion for Summary Judgment, pp. 1-2).

Allied contended in support of its motion for summary judgment that Ku could not establish a prima facie case of discrimination because he could not prove that he was performing his job at a level that met Allied's legitimate expectations, and because Ku's position was abolished and he was not replaced by a person not in the protected group. Allied also contended that Ku could not show that Allied's stated reason for eliminating his position was a mere pretext for discrimination (Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 12-16).

In response to Allied's motion for summary judgment, Ku presented a detailed affidavit with a careful and factual analysis of each of the criticisms leveled at him by Duffy, showing that each of these criticisms was grossly unfair. Ku also pointed out that Biron, who was three levels of supervision removed from Ku, had no personal knowledge of Ku's

work, had never observed Ku's work or discussed Ku's work with him, and was therefore relying entirely upon the representations of Cole and Duffy.

The District Court granted Allied's motion for summary judgment, holding that, while the evaluation given to Ku by Cole may have been inaccurate and unfair, "there is nothing to indicate that any inaccuracy or unfairness is the product of discriminatory intent" (App. 16a-17a). The District Court also noted that "it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December" (App. 17a). On Ku's appeal, the Court of Appeals affirmed the judgment "on the reasoning of the district court" (App. 2a).

REASONS FOR GRANTING THE WRIT

There exists a fundamental conflict between the judgment of the District Court and the Court of Appeals in this case and the guidelines established by this Court for the consideration of motions for

summary judgment under Rule 56, Federal Rules of Civil Procedure, especially as they should be applied in cases of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. This case presents a basic issue in the application of Rule 56 which warrants further guidance from this Court to the lower Courts with respect to the appropriateness of summary judgment in a case in which motive and intent are critical elements of a claim or defense.

This case also presents a basic issue in the litigation of claims under Title VII. The award of summary judgment to the defendant in this matter in the face of evidence that its proferred explanation for its conduct is unworthy of belief will, if uncorrected, significantly interfere with the effectiveness of Title VII as a tool in combatting invidious discrimination in employment. The uncritical acceptance by the lower Courts of the rationale offered by the employer for its actions signals a departure from the guidance of this Court

in prior Title VII cases, and permits employers to avoid appropriate scrutiny of their motives and states of mind which can only result from a trial in which the trier of fact can observe the demeanor of the witnesses on direct and cross examination.

The entry of summary judgment for the defendant in this matter while a significant discovery matter was pending also merits review by this Court. Where the vast majority of the documents which the plaintiff might be able to use to rebut the defendant's claimed non-discriminatory reason for its actions are in the possession of the defendant, the district courts should be very reluctant to award summary judgment to a defendant while a discovery dispute remains unresolved. This issue is one of general importance in the administration of summary judgment procedures under Rule 56.

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT HAVE MISSAPPLIED THE STANDARDS TO BE USED IN GRANTING MOTIONS FOR SUMMARY JUDGMENT IN A MANNER WHICH CONFLICTS WITH THIS COURT'S DECISION IN ADICKES v. S. H. KRESS & CO., 398 U.S. 144 (1970).

It is well established that in considering a motion for summary judgment under Rule 56, Fed. R. Civ. P., the burden is upon the moving party to demonstrate the absence of any genuine issue of material fact and the court must view the facts and the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-9 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The district court and the Fourth Circuit have clearly violated this fundamental rule in their consideration of Allied's motion for summary judgment, and have taken a view of the facts most favorable to Allied and drawn inferences from the facts in a manner favorable to Allied.

The district court's memorandum setting forth its reasons for granting the motion for summary judgment is replete with such examples. For example, the district court infers from the fact that Cole included a three month action plan in his December 10, 1985 evaluation of Ku's performance that Cole actually intended to retain Ku for the immediate future, which suggested to the district court that Ku's theory of discrimination was not worthy of credence (App, p. 13a-14a). Viewed in the light most favorable to Ku, the fact that Ku was informed only two days later that his position was to be abolished under the census/cost reduction program would suggest that the "three month action plan" outlined by Cole was a mere smoke screen, and that the December 10 evaluation was designed entirely to support the decision to eliminate Ku's position.

The district court also suggests that Ku was aware that he was not completing his assignments in a timely manner prior to December 10, 1985, relying on Ku's testimony at page 129 of his deposition. In

fact, Ku's testimony was that his completion of the assignment in question was delayed by factors beyond his control.

The district court also found that "it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December" (App. 17a). This analysis by the district court not only draws a significant inference in a manner most favorable to Allied, but also ignores the fact that Duffy had taken control of Ku's department from Francario in the meantime. When asked why he had given Ku such an unfavorable evaluation, Cole told Ku that he did so because Duffy told him to do so. Viewed in the light most favorable to Ku, these facts show that the change in Allied's management between February and December would explain the apparent inconsistency and point to Duffy as the Allied manager whose motivations and attitudes require closest scrutiny by the finder of fact. However, no affidavit from Duffy was ever presented to the district court.

The district court excuses its failure to consider the detailed rebuttal of Cole's performance appraisal by characterizing Ku's affidavit as "protestations and conclusory allegations" (App. 16a). Ku's detailed and factual nine-page affidavit, in fact, provides a point-by-point rebuttal of every matter raised by Cole as a criticism of Ku's work. The district court's reliance on Mack v. W. R. Grace Co., 578 F.Supp. 626 (N.D.Ga. 1983), was entirely misplaced. In that case, the employer showed that the plaintiff had been counseled for poor job performance sixteen times over a two year period. This counseling was evidenced by handwritten notes kept by the plaintiff's supervisors and providing detail after detail of the plaintiff's poor performance. The plaintiff's response was that his performance had been good and that he had been "framed," but the plaintiff provided no facts to support his bald claim that he was "framed." The contrast between the record in Mack and the record in the present case could not be greater.

The district court and the Fourth Circuit have disregarded the facts presented by Ku and have drawn numerous tenuous inferences favorable to Allied from the facts presented by it. Most significantly, however, the lower Courts have disregarded the fact that Allied has not presented any affidavits from either Cole or Duffy, the Allied officials whose actions are most in question. The moving party in a motion for summary judgment may meet its burden under Rule 56 by pointing out to the Court a failure of proof on an fact essential to the plaintiff's claim. Celotex Corp. v. Catrett, _____ U.S. _____ (1986). However, where Ku's affidavit has cast serious doubt on the good faith of Cole and Duffy, the failure of Allied to present any account of the matter from these two key actors should be taken into account. Adickes v. S. H. Kress & Co., supra, at 158-9.

In sum, the district court and the Fourth Circuit have ignored this Court's guidance in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464,

473 (1961), which applies with equal force to discrimination suits as it does in the field of antitrust:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

(Footnote omitted.)

II. THE DEGREE OF PROOF IMPOSED BY THE DISTRICT COURT AND THE FOURTH CIRCUIT UPON A PLAINTIFF IN A CIVIL ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 RESPONDING TO A MOTION FOR SUMMARY JUDGMENT IS UNREASONABLE AND UNREALISTIC, AND WILL DECREASE THE VITALITY OF THAT ACT AS A REMEDIAL DEVICE FOR INVIDIOUS DISCRIMINATION IN EMPLOYMENT.

In Anderson v. Liberty Lobby, Inc., _____ U.S. _____ (1986), the Court held that the determination of whether or not to grant a motion for summary

judgment must be guided by the substantive evidentiary standards that apply to the case. In a case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., these standards are provided in the landmark decisions of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The district court and the Fourth Circuit have failed to heed these standards in granting summary judgment for Allied in this case.

It is undisputed that Ku is a member of the protected class under Title VII, and that he was discharged by Allied. It is also undisputed that Ku was the only member of the protected class in his department, and that he was the only person in his department singled out for discharge under the census/cost reduction program. The district court is unclear in its memorandum whether or not it viewed these facts as sufficient to establish a prima facie case of discrimination (App. 15a). However, the

district court assumed that Ku had established a prima facie case of discrimination, and proceeded in accordance with McDonnell Douglas to examine the non-discriminatory reason for its actions advanced by Allied.

Ku does not dispute that Allied has met its burden of articulating a legitimate, non-discriminatory reason for its actions. It is then Ku's burden to offer evidence from which a reasonable finder of fact might conclude that Allied's stated reasons were in fact a pretext for discrimination.

In Burdine, this Court stated that an employee may meet his burden of demonstrating that the reason advanced by the employer is a pretext for discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." 450 U.S. at 256.

Biron's said in his affidavit that his selection of Ku's position for elimination under the census/cost

reduction program was largely based on the reports of Ku's job performance he received from Cole and Duffy. According to Ku, Biron would not have had any opportunity to examine first-hand Ku's job performance. Cole's stated views of Ku's job performance are contained in his appraisal of Ku on December 10, 1985. Thus, the only factual basis in the record for Biron's decision to eliminate Ku's position is the December 10 evaluation, which Cole said he was told to write by Duffy.

Ku has provided a detailed affidavit showing that Cole's criticisms found in the December 10 evaluation are not worthy of credence. Ku's evidence, if believed, would show that Cole grossly distorted his job performance in the December 10 evaluation, that Cole had never prior to December 10 shown any dissatisfaction with Ku's performance, and that the whole evaluation was cobbled together to give support to Allied's plan to dismiss Ku for no valid reason. This, coupled with Ku's unique status as the only minority in his department, would permit

a reasonable finder of fact, after scrutinizing the demeanor of Allied's officials under cross-examination, to conclude that they acted with improper discriminatory motive and intent.

The district court and the Fourth Circuit, however, disregarding the dictates of Burdine, have imposed a more stringent standard of proof upon Ku. They have, in effect, imposed upon Ku a requirement to present direct proof of discrimination, such as evidence of racist statements by Allied personnel, racial slurs directed against him by his supervisors or other Allied officials, or documentary evidence showing a consciousness of race on the part of Allied officials involved in the case.

Of course, such direct evidence of racial animus will very rarely be found, especially in cases involving relatively high level professional employees. In such cases, plaintiffs in discrimination actions under Title VII must necessarily rely upon circumstantial evidence of racial animus. The plaintiff must seek to prove that the proffered nondis-

criminatory basis for the defendant's actions is false, and that the defendant's officials must have known it to be false. The trier of fact can then conclude, on the basis of all the evidence, that the employer acted in bad faith in his dealings with the employee. If the employee were a member of a racial minority, and were the only employee affected by the employer's actions, the trier of fact could conclude that racial discrimination was the underlying basis for the bad faith actions of the employer.

Under the reasoning of the district court and the Fourth Circuit, an employer in a Title VII case need only show that at some time prior to the alleged discriminatory termination one or more of the plaintiff's superiors has expressed dissatisfaction with the plaintiff's work performance. That expression of dissatisfaction may be unfair, it may be unjust, it may be false, and it may be deliberately instituted and timed to provide apparent support for a planned adverse action against the employee. Unless the employee can provide the court with direct evidence

that racial bias was the basis for the untrue job performance evaluation, the employer is entitled to summary judgment.

This rule is a license for discrimination by the sophisticated bigot. He can easily produce a document comparable to Cole's December 10, 1985 evaluation of Ku, and use it to justify any action he wished to take against any minority employee, secure in the knowledge that no court will ever seek to question the veracity or validity of his evaluation. If he carefully refrains from racial insults he can weed out any minorities who come under his supervision and maintain his all-white work force indefinitely.

This is surely not what Congress intended in enacting Title VII. It does not comport with this Court's guidance in Burdine. It conflicts with the rule in the District of Columbia Circuit. Lanphear v. Prokop, 703 F.2d 1311 (D.C.Cir. 1983). If followed, it would significantly diminish the utility of Title VII as a remedy for invidious discrimination in employ-

ment. These factors make the question of whether a court may refuse to consider indirect proof of discriminatory intent in an employment discrimination case worthy of review by this Court.

III. THE DISTRICT COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT FOR THE DEFENDANT WHILE THE PLAINTIFF'S MOTION TO COMPEL DISCOVERY WAS PENDING.

On June 20, 1988, Allied responded to Ku's Third Interrogatories and Third Request for Production of Documents, both dated May 20, 1988. Allied stated at that time that it was unwilling to provide Ku with many of the documents he sought in discovery without a protective order which would require Ku to keep the documents and their contents confidential. A draft protective order was furnished with the response. Ku agreed to the protective order, and it was entered by the district court on July 6, 1988. In the meantime, Allied filed its motion for summary judgment on June 22, 1988. Remarkably, the memorandum filed by Allied in

support of its motion for summary judgment states that "[t]he parties have now essentially completed discovery in this action."

On June 23, the district court entered an Order requiring Ku to submit his response to Allied's motion for summary judgment on or before July 6, 1988. On June 30, Ku requested an extension of time to respond to the motion for summary judgment until July 22, 1988. On July 5, the district court extended the time for Ku to respond to Allied's motion for summary judgment until July 15, 1988.

Ku filed his response to Allied's motion for summary judgment on July 6, 1988. In his memorandum in opposition to Allied's motion for summary judgment, Ku strenuously objected to the district court's consideration of the motion at a time when, because of delays imposed by Allied, substantial discovery remained unanswered. Ku requested that the Court delay consideration of the motion for summary judgment until he had an opportunity to

review the documents which had been requested but not provided.

On July 19, 1988, Ku filed a motion to compel discovery. In his memorandum in support of his motion to compel discovery, Ku stated that many of the documents which he sought for the purpose of demonstrating that Cole's characterization of his performance in the December 10, 1985, performance evaluation was not worthy of credence and of comparing his performance with that of other non-minority personnel in his department were not made available to him, despite the entry of the protective order. The next day, July 20, 1988, without any consideration of Ku's motion to compel discovery whatsoever, the district court awarded summary judgment to Allied.

Under these circumstances, the district court should at least have considered Ku's motion to compel discovery before granting Allied's motion for summary judgment, particularly since the district court's chief criticism of Ku's response to the motion

for summary judgment was that it consisted of protestations and conclusory allegations by Ku, rather than objective evidence. Instead, the district court should have acted in accordance with Rule 56(f), Fed. R. Civ. P., and either refused the application for judgment or taken some other measure to insure that Ku had a sufficient opportunity to gather the documents necessary to support his allegations. Celotex Corp. v. Catrett, _____ U.S. _____, _____ at note 6 (1986). While this matter was raised by Ku before the Fourth Circuit, that Court's opinion did not address or consider this point.

The district court's departure from the requirement that summary judgment not be granted unless the non-moving party has had an adequate opportunity to discover documents critical to his case merits review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record

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88-1860

Supreme Court, U.S.
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No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3134

PING L. KU

Plaintiff - Appellant

ALLIED-SIGNAL INC.

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (C/A No. 87-0567)

Submitted: November 30, 1988 Decided: December 30, 1988

Before ERVIN and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Ping L. Ku, Appellant Pro Se. Donald Lester Creach, Thomas J. Flaherty (HUNTON & WILLIAMS) for Appellee.

PER CURIAM:

Ping L. Ku appeals from the district court's order denying relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Ku v. Allied-Signal Inc., C/A No. 87-0567 (E.D. Va. July 20, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

No. 88-3134 Feb-3 1989

U.S. Court of Appeals

Fourth Circuit

Ping L. Ku,

Plaintiff - Appellant,

v.

Allied-Signal, Inc.,

Defendant - Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Senior Judge Butzner, with the concurrence of Judge Ervin and Judge Wilkins.

For the Court

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
JUL 20 1988

PING L. KU,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 87-
v.	)	0567-R
	)	
ALLIED-SIGNAL, INC.,	)	
	)	
Defendant.	)	

FINAL ORDER

For reasons stated in the accompanying Memorandum, the defendant's motion for summary judgment is GRANTED, and JUDGMENT is hereby ENTERED in favor of the defendant.

As this is a Final Order from which an appeal will lie, plaintiff is ADVISED that if he chooses to appeal he must file a notice of appeal with the Clerk of the Court within thirty (30) days of the date of this Order.

And it is so ORDERED.

/s/James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: JUL 20 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
JUL 20 1988

PING L. KU,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 87-
v.	)	0567-R
	)	
ALLIED-SIGNAL, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM

This matter comes before the Court on defendant's motion for summary judgment. The motion has been fully briefed by the parties and is now ripe for decision. For reasons stated below, the motion for summary judgment will be GRANTED.

Background

Plaintiff Ping L. Ku ("Ku"), who is of Asian/Chinese origin, was hired by defendant Allied-Signal Inc. ("Allied") as a Research Specialist III, Grade 11, in the Home Furnishings Department of the Fibers Division, on February 11, 1985. Ku's immediate supervisor at the Petersburg location was Charlie

Cole ("Cole"), the Manager of the Applied Research Group. Alan Francario ("Francario"), the Manager of Product Development, supervised Cole until Ed Duffy ("Duffy") took over sometime in 1985. Ray Biron ("Biron"), the Director of Technical and Commercial Development, supervised Francario and Duffy.

In late 1985, Allied implemented a census/cost reduction program aimed at identifying positions in the corporation which could be eliminated. Biron identified Ku's position as one which could be eliminated. On December 12, 1988, Duffy and Cole informed Ku of this development. Ku was given the option of receiving additional notice and severance pay, or additional credit toward a pension, and selected the latter. He currently receives a pension of approximately $600 per month.

Ku's employment with Allied ended on January 31, 1986. He subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming that he was discharged on account of his race. Having received a

Notice of Right to Sue from the EEOC, Ku brought the instant suit, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.

Legal Standards

The United States Supreme Court has recently discussed the standard to be applied by District Courts when considering motions for summary judgment.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, _____ U.S. _____, _____,

106 S.Ct. 2548, 2552-53 (1986) (quoting Fed. R. Civ. P. 56 (c)).

The use of summary judgment in discrimination cases must be used sparingly and approached with extreme caution. Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986). This is so because discrimination cases often involve issues of intent and motive. Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981). Some cases, however, are appropriate for summary judgment. The United States Court of Appeals for the Fourth Circuit has stated:

> Care is required in deciding whether the evidence presents a genuine issue of motive, for "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Resolution of questions of intent often depends upon "the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination." Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979). We do not suggest, however, that summary judgment has no role in Title VII litiga-

> tion. "The fact that motive is often the critical issue in employment discrimination cases does not mean that summary judgment is never an appropriate vehicle for resolution." International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1272 (4th Cir. 1981) (emphasis in original). Unsupported allegations as to motive do not confer talismanic immunity from Rule 56.

Ross v. Communications Satellite Corp., 759 F.2d 355, 364-65 (4th Cir. 1985).

The analysis a court is to follow in Title VII cases was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This analysis is also appropriate when a court considers a motion for summary judgment. Everett v. Comsat, 33 F.E.P. Cases 793, 796 (D.D.C. 1983). The plaintiff has the initial burden of establishing a prima facie case of discrimination. Ordinarily in discharge cases the plaintiff must show that he is a member of the protected class, that he was discharged, that he was performing satisfactorily, and that he was replaced by someone outside the protected class. Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988).

However, in reduction-in-force situations a more appropriate scenario requires the plaintiff to show that he is in the protected class, that he was qualified to assume another position at the time of his discharge, and that the defendant either (a) consciously refused to consider retaining plaintiff because of his race, or (b) regarded plaintiff's race as a negative factor in such consideration. Fink v. Western Electric Co., 708 F.2d 909, 915, (4th Cir. 1983); Williams v. General Motors Corp., 656 F.2d 120, 129-30 (5th Cir.), cert. denied 455 U.S. 943 (1982).

Nevertheless, once the plaintiff has established a prima facie case, the defendant must articulate a non-discriminatory reason for its actions. Thereafter, the plaintiff must show that the defendant's justification was a mere pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04.

Discussion[1]

It is a given that Ku is a member of the protected class and that he was discharged. While his qualifications to hold that position or to fill another have been questioned, the Court need not focus on that issue. The final element, that race was a consideration in the defendant's conduct, will be explored.

Ku's argument in this regard can be traced to four main points. First, Ku was the only non-white salaried employee in his department. Second, he argues that the timeliness of his evaluation, coming shortly before his discharge, is indicative of a discriminatory plot or conspiracy. Third, Ku states that he never received any negative feedback concerning his work prior to the aforementioned

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[1] Allied argues that Ku did not timely file a charge with the EEOC, a fact which, if true, would bar suit in this Court. Inasmuch as the Court concludes that Ku has presented no evidence to substantiate a charge of race discrimination, the timeliness argument need not be addressed.

evaluation. Fourth, Ku argues that the evaluation was inaccurate and unfair.

From these points, Ku asks this Court to draw the inference that his race was a factor in the defendant's decision to eliminate his position. They will be discussed below. It is undisputed that Ku was the only non-white in the department. It is likewise and undisputed that Ku was the only Asian to be included among the final candidates for the position in February of 1985, yet was chosen for the position over non-Asians.

A thorough review of Ku's December 10, 1985 evaluation or "Performance Appraisal" reveals that, while dissatisfied with Ku's performance to date, Cole took great pains to detail a three month action plan in which specific projects were assigned to Ku to be completed by specific dates. While the effect of the census/cost reduction program prevented Ku from addressing these projects, their presence nonetheless indicates an intent to retain Ku for the immediate future. If Ku's conspiracy theory is to be

given credence, it is more likely that such an intent would not have been made manifest in the evaluations.

Furthermore, although there is no evidence that Ku was given negative feedback prior to the December 10, 1985 evaluation, Ku himself admits that he was aware that he had not completed assignments in a timely manner. See, e.g., Ku Deposition, at 129.

Lastly, Ku takes issue with the substance of the evaluation. The evaluation, in short, states that Ku had completed only three minor projects, had failed to demonstrate the requisite ability to conduct complex advanced programs, and had required too much supervision by Cole. Ku, by affidavit, contends that "[t]hese criticisms are so inaccurate and unjust as to indicate that they are in fact a mere pretext for the racial discrimination which Allied engaged in terminating my employment." Ku Affidavit, at Paragraph 6. Ku's protestations and assumptions of evil motives do not amount to the objective evidence necessary to create a genuine issue regarding a

material fact, and thus are not sufficient to withstand summary judgment.[2]

Even assuming that Ku was able to make out a prima facie case, Allied has articulated legitimate, non-discriminatory reason for its actions. Biron, by way of affidavit, states that in connection with the census/cost reduction program he was responsible for identifying positions in his department which could be eliminated. Ku's position was so identified for the following reasons: his position was the most recent addition to the operation, the operation had

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[2]In a memorandum filed on July 15, 1988, and labeled "Plaintiff's Summary on Defendant's Racial Job Discrimination," Ku states the following:

> I believe that Mr. Duffy used the Census/Cost program as a pretext to get rid of me so that he would have all "white" under him. On December 10, 1985, Duffy ordered Mr. Cole to write out a poor performance with harsh comments and rated me a 4 without my presence (I was told be Cole afterwards).

Memorandum, at paragraph 4.

The assertions and accusations contained in this excerpt are not presented by way of affidavit, and will not be considered by the Court.

functioned effectively before the position came into being, Ku failed to make a significant contribution to the overall operation due to his unsatisfactory performance, and Ku's need for supervision prevented Cole from addressing other concerns, thus the elimination of that supervisory responsibility would be beneficial.

Having articulated such reasons, the burden again shifts to Ku to demonstrate pretext. Ku "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Ku's attempt to show pretext consists of the protestations and conclusory allegations discussed above. While Ku may believe, and may be correct in believing, that his evaluation was inaccurate and unfair, there is nothing to indicate that any inaccuracy or unfairness is the product of discriminat-

ory intent. Moreover, it was not Ku's performance alone that persuaded Biron to eliminate his position. The newness of the position and the proven ability of the department to function effectively in its absence were also factors. Finally, it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December.

"[S]peculation is not sufficient to defeat a summary judgment motion." Ash v. United Parcel Service, Inc., 800 F.2d 409, 411-12 (4th Cir. 1986).

> [W]hen an employer makes an convincing showing that it discharged an employee for non-discriminatory reasons and the discharged employee introduces no evidence that the non-discriminatory reasons proferred by the employer are pretextual and no evidence from which an inference of pretext can be rationally drawn, summary judgment for the employer is appropriate.

Mack v. W. R. Grace Co., 578 F.Supp. 626, 631 (N.D. Ga. 1983), cert. denied, 105 S.Ct. 62, reh'g denied, 105 S.Ct. 578 (1984).

Summary judgment in favor of the defendant will be granted. An appropriate Order shall issue.

/s/James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: JUL 20 1988

STATUTE AND RULE PROVISIONS

TITLE 42, UNITED STATES CODE

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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42 U.S.C. § 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc., filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and

promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

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Time for filing charge; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from

such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charges shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occured, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions, procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or

political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such a charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the

alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes

of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over the proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to

such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then

designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; limitation on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,

which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such an individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

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(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a

declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the

motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1860

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ALLIED-SIGNAL, INC. IN OPPOSITION

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June 15, 1989

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's determination that there was no genuine issue as to any material fact and this action was ripe for decision upon summary judgment?

2. Did the Court of Appeals err in concluding that the District Court did not abuse its discretion in determining that the status of discovery did not preclude a decision upon summary judgment?

LIST OF SUBSIDIARIES AND AFFILIATES

Respondent Allied-Signal, Inc. makes the following statement pursuant to Sup. Ct. R. 28.1. Allied-Signal, Inc. has no parent company. Allied-Signal, Inc.'s subsidiaries (except wholly owned subsidiaries) and affiliates are as follows:

Allied-General Nuclear Services
ACE, Limited
Allied Holdings (UK) Limited
Bendix HVCG Europe Limited
Ferranti-Bendix Power Generation Limited
Jurid Werke, GmbH
Ingold Electrodes, Inc.
Enscor Inc.
Sonic Oil Separation, Ltd.
Allied Automotive Ltda.
Bendix France, S.A.
Amoricaine de Fonderia-Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Electronics, S.A.
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.A.
Dipra Ricambi, S.p.A.
Bendix Portuguesa Sociedede de Equipamentos Automoveid, Ltda.
Bronzavia Air Equipment, S.A.
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.
Freudenberg, S.A.
Iminor, S.A.
Societe Civile Immobiliere Prieur & Cie
La Decoration Moderne, S.A.
Sifra Industries, S.A.
Societe Civile Immobiliere due 60 Av. De La Grandee Armee
TENSA, S.A.
Transpar Iberica, S.A.

Bendix Italia, S.p.A.
Bendix Altechna Freni, S.p.A.
Bendix Mexicana, S.A. de C.V.
Bendix Pemsa Cinturones de Seguridad, S.A. de C.V.
FIAAM, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Turbo Services SNC
Sistemas Bendix de Seguridad S.A. de C.V.
Allied-Signal Flight Systems Company
Kalyani Brakes Limited
Bendix Electronics Korean, Limited
Bendix Electronic Service Corporation de Espana, S.A.
Bendix Espana, S.A.
Bendix-Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Superannuation Pty., Ltd.
Bunker Ramo Electronic Data Systems S.A.
Chico Corporation
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
Garrett Comtronics Licensing Corp.
Globe Auto Electricals, Ltd.
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Turbine Engine Corporation
Jidosha Kiki Co., Ltd.
Kanto Seiatsu Kogyo Co., Ltd.
Tokyo Chuzsho
Leaseway All-Services, Inc.
Manbritt Industries, Inc.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Normalair Garrett (Holdings) Ltd.
Dynamic Turbocharger Services Pty., Ltd. Queensland
Asia Pacific Resin Corporation
Doosan Electro-Materials Co., Ltd.
Financiere Allied-Signal S.A.

Nittobo-Norplex/Oak Inc.
Norplex/Oak India Ltd.
Oak Mitsui Inc.
Bendix Electronics, S.A.
Prestolite of India Ltd.
Quimobasicos, S.A.
Propelentes Mexicanos, S.A.
Sifra Industrie, S.A.
Societe Anonyme des Usines Chausson [SECAN]
Societe Wheelabrator-Allevard S.A.
Sofratype, S.A.
Synektron Corporation
Union Texas Petroleum Holdings, Inc.
UOP
Nikki/Universal Co., Ltd.
UM Holdings B.V.
Serind S.p.A.
UMMS Caribbean N.V.
Ataisa S.a.c.i.
Tecpro Industrial Chemicals Ltd.
UOP Management Services (Saudi Arabia) Limited
JSR-Allied Corporation
Lucky Allied Plastics Corporation
Bendix Soehan Corporation

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1860

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ALLIED-SIGNAL, INC. IN OPPOSITION

Allied-Signal, Inc. ("Allied") respectfully requests that the Petition for Certiorari filed by Ping L. Ku ("Ku") be denied.[1]

STATUTES AND RULES INVOLVED

In the Appendix to his Petition, Ku set forth portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and portions of Fed. R. Civ. P. 56. Allied agrees that Title

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[1] Allied concurs in Ku's description of the parties, report of the opinions and judgment below, and statement of jurisdiction. This Brief cites to the opinions below by reference to the Appendix to Ku's Petition, pages 1a to 15a.

VII and Rule 56 are involved in this case, though Allied does not agree that every portion set forth in Ku's Appendix is involved. In addition, Rule 56(e) applies to this case and is set forth as an Appendix to this Brief.

STATEMENT OF THE CASE

In 1984, Allied created a new position of Research Engineer in polymer science in the Applied Research group at its Technical Center in Petersburg, Virginia, and Allied advertised nationally for applicants. For this position, Allied was looking for someone with a substantial amount of education and experience in polymer science who would be able, with only minimal supervision, to conduct sophisticated research in the emerging technology being applied to carpet fibers. Ku applied for this position, and among the final candidates, he was the only Asian. Due to his apparently extensive background in polymer science, Ku was offered the position, and he accepted at an annual salary of $40,200. He began his employment with Allied effective February 11, 1985.

Following his weeks of orientation, Ku was given a few fairly simple assignments which would familiarize him with the nature of the work. In view of his background and the nature of the assignments, it was expected that he would complete the assignments easily and quickly and would soon be ready to take on the more complex, sophisticated projects for which he was hired. As it turned out, however, Ku took longer than was expected to complete these assignments.

During the course of 1985, as Ku was given additional assignments, he was given detailed explanations of what was expected. Ku indicated that he understood the nature of the assignments, and he provided estimates of how long the projects should take. The work he produced, however, did not indicate an understanding of the projects or the principles underlying the projects. Ku took much longer than he had estimated for the projects and much longer than the projects should take for someone with a substantial background in polymer science. In addition, he required an excessive amount of supervisory time and attention from his immediate supervisor, Charlie Cole. This not only was disappointing in view of Ku's

extensive background, but diminished the overall productivity of the group.

Ray Biron was the Director of Technical and Commercial Development, whose responsibility included the Applied Research group. During Ku's employment, Biron had numerous conversations with Cole and other managers with responsibility over Ku's work, and he learned of their dissatisfaction with Ku's performance. Biron also directly reviewed and observed Ku's work product and performance on a number of occasions.[2]

In late 1985, Allied-Signal, Inc. implemented a census/cost reduction program in which the various sectors of the corporation were to identify positions that could be eliminated without adversely affecting business operations. This program provided enhanced separation benefits to the persons whose positions were eliminated.

In connection with this program, Biron reviewed the composition of the workforce in his group and selected Ku's position as one of those to be eliminated. Biron determined that Ku's position was one of those that could be eliminated with the least adverse effect on the operation of his area. Ku's was the position most recently added to the Applied Research group, and Ku had only been in that

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[2] In his Petition, Ku states as fact that Biron never reviewed his work. Allied provided the District Court an Affidavit from Biron stating that Biron had directly reviewed and observed Ku's work product and performance on a number of occasions. Ku submitted an Affidavit to the District Court setting forth Ku's belief that Biron never reviewed his work. To the extent Ku was describing his personal observations of Biron's actions, his Affidavit at most would raise an issue about a fact which is not material, since Biron had opportunities to review Ku's work product and performance without being observed by Ku. Ku's Affidavit went beyond his personal knowledge, however, in violation of Fed. R. Civ. P. 56(e), to state categorically that Biron did not review Ku's work product and performance. Such a statement not based on personal knowledge cannot raise a genuine issue of material fact. *See, e.g., Antonio v. Barnes*, 464 F.2d 584, 585 (4th Cir. 1972.)

Ku's Petition contains various other representations of fact which are not supported by the record or which provide only Ku's version of disputed facts. To the extent the facts were disputed, the District Court properly concluded that those facts were not material to its disposition of Allied's motion for summary judgment.

position approximately nine months. Before the position was created and Ku was hired, the group had functioned for a long time without such a position. During the period in which Ku held the position, he did not make any significant contribution to the operation of the group, so the group would not experience any significant loss if Ku were no longer in the position. In fact, Ku required so much supervisory attention due to his poor performance that removing Ku from the position was likely to improve the overall operations of the group.

On December 12, 1985, Ku was informed that his position was being eliminated as part of the census/cost reduction program. He was given a choice of types of enhanced separation benefits, and he chose to receive additional credit of five years of age and five years of service toward a pension. Adding this credit to Ku's age and his one year of service gave him sufficient credit for a 60-point pension, whereas he otherwise would not have been eligible for any pension. After his employment ended, he began receiving a pension of approximately $600 per month, which he has received continuously since then.

As was specified in the census/cost reduction program, Ku's position was completely eliminated, and he has never been replaced.

Following the end of his employment, Ku contacted the Equal Employment Opportunity Commission (EEOC). Ku was familiar with the EEOC because he had contacted the EEOC and had inquired about filing a Charge of Discrimination when a previous employer had eliminated his job. Ku was aware that he had a limited amount of time to file a Charge with the EEOC, and he called the EEOC and learned specifically what the time limit was. Nevertheless, Ku did not file a Charge until after the period had expired.

The EEOC ultimately issued a Determination that there was no reasonable cause to believe Ku's allegation of race discrimination was true. Ku thereafter filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, alleging that Allied had discriminated against him on the basis of race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in eliminating his position and terminating his employment.

In connection with the District Court action, Allied took Ku's deposition and asked Ku to state the factual basis for his belief that he was discriminated against because of his race. He responded simply that he believed he had performed well, yet was singled out for job elimination. He also indicated that he thought Ed Duffy, his second-line supervisor, was personally hostile toward him. When Ku was asked what, if anything, such supposed hostility had to do with his race, Ku responded, "Because he just hate[s] me, that's all." Ku stated that these facts provided the entire basis for his claim.

In his deposition, Ku admitted that during the meeting in which he was informed of his job elimination, there was no mention of his race, and no Allied representative has ever said anything that indicated that his race was a factor in the decision to eliminate his job. In fact, he admitted that during all of his dealings with Allied, no Allied representative ever said anything to him at all about his race. He further admitted that he did not even know who had made the decision to eliminate his job, though he speculated (incorrectly) that it was Duffy. Finally, he admitted that he did not know how his work or his qualifications compared with those of the other members of the Applied Research group, and he did not know Allied's evaluation of the other employees' work performance.

Allied filed a motion for summary judgment in the District Court, asserting that the undisputed facts established that Ku could not satisfy his burden of proof, and Allied therefore was entitled to summary judgment in its favor pursuant to *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Allied asserted that the undisputed facts established that Ku did not file a Charge with the EEOC within the required period and therefore did not satisfy the prerequisites to maintaining the action; there was no direct evidence that Allied intended to discriminate against Ku; using indirect methods of proof, Ku could not establish a *prima facie* case of discrimination because he had not been performing his job duties at a level that met Allied's legitimate expectations, he was not replaced by a person outside the group protected from discrimination, and there was no other evidence to support the inference of discrimination necessary for a *prima facie* case; and there was no evidence that Allied's articulated legitimate, nondiscriminatory reasons for eliminating Ku's job were a pretext for discrimination. Allied's motion was

based largely on Ku's deposition, but Allied also submitted the Affidavit of Ray Biron, the person who made the decision to eliminate Ku's job.

The District Court granted Allied's motion for summary judgment on the grounds that Ku had not submitted sufficient evidence to raise a *prima facie* inference of discrimination, and even if Ku could establish a *prima facie* case, there was no evidence that Allied's articulated legitimate, nondiscriminatory reasons for eliminating Ku's job were a pretext for discrimination. In view of its conclusions on these points, the District Court did not consider Allied's arguments that Ku had not filed a timely Charge of Discrimination and that Ku could not establish a *prima facie* case because he could not prove that he was satisfying Allied's legitimate expectations as to job performance.

Ku then appealed to the United States Court of Appeals for the Fourth Circuit. A panel of the Court of Appeals issued a *per curiam* opinion affirming the District Court's decision. Ku filed a petition for rehearing and suggestion for hearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and the petition was denied. The instant Petition followed.

ARGUMENT

This action does not present any issues which would justify exercise of this Court's discretionary jurisdiction on a petition for certiorari. This is a routine action in which the Court of Appeals simply affirmed, without dissent, the District Court's determination that an ordinary employment discrimination action was ripe for decision upon summary judgment. The petition for certiorari accordingly should be denied.

1. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE ACTION WAS RIPE FOR DISPOSITION UPON SUMMARY JUDGMENT.

In support of its motion for summary judgment, Allied cited the portions of Ku's deposition and the Biron Affidavit which established the undisputed facts necessary for resolution of this action. Ku now challenges the District Court's determination, as affirmed by the Court of Appeals, that there were sufficient undisputed facts to allow the action to be decided upon summary judgment.

As noted above, Allied demonstrated numerous grounds upon which the District Court should find that Ku could not prove the essential elements of his claim, so that the Court should enter summary judgment in favor of Allied pursuant to *Celotex Corp. v. Catrett*, 477 U.S. at 322-23. Among those grounds, Allied showed that there was no direct evidence of discrimination, and Ku could not rely on the indirect method of proof because he could not carry his burden of proving two of the necessary elements of a *prima facie* case of discrimination.

Where, as here, the plaintiff's employment has been terminated, the plaintiff must prove the following four elements to establish a *prima facie* case: (1) that he was in a group protected by law from discrimination; (2) that his employment was terminated; (3) that at the time his employment was terminated, he was performing his job duties at a level that met his employer's legitimate expectations; and (4) that following the termination of his employment, he was replaced by someone not in the protected group. *See, e.g., EEOC v. Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). In its motion, Allied acknowledged that the first two elements were present, but demonstrated that Ku could not prove the third element or the fourth element.

Ku now argues that his Affidavit showed that he was, in fact, satisfying Allied's legitimate expectations. That argument does not present an issue worthy of this Court's attention and does not begin to satisfy the standard of Sup. Ct. R. 17 as to when the Court will exercise its discretion to grant a writ of certiorari.

The more fundamental flaw in Ku's argument, however, is that the District Court did not base its decision on Allied's contention that Ku could not establish the third element of the *prima facie* case, but found that Ku could not prove the fourth element. (11a). It was undisputed that Ku's position was eliminated, and he was not

replaced by anyone, either in the protected group or not. In that circumstance, to establish a *prima facie* case, the plaintiff must present some other evidence sufficient to support the necessary inference of discrimination. *See, e.g., EEOC v. Western Electric Co.*, 713 F.2d at 1014-15. The District Court found that Ku did not adduce any evidence which would support an inference of discrimination. Thus, even if Ku's argument were accepted, it would not affect the validity of the District Court's decision, as affirmed by the Court of Appeals.

Moreover, Ku's Affidavit setting forth his own opinion of his performance did not raise a genuine issue of material fact. Such a conclusory statement of opinion violates Fed. R. Civ. P. 56(e), which requires that an affidavit in opposition to a motion for summary judgment set forth specific admissible *facts* showing that there is a genuine issue for trial. Also, Ku's self-assessment is irrelevant, as a matter of law, to a determination of Allied's motivation and cannot raise a genuine issue of material fact. *See, e.g., Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980); *Smith v. Chamber of Commerce*, 645 F. Supp. 604, 608 (D.D.C. 1986). And even if it were accepted that Ku performed as well as he contends, it would remain undisputed that Ku's position was the one that could be eliminated with the least adverse effect on his group. Ku admitted in his deposition that he did not know how his work or his qualifications compared with those of the other members of the Applied Research group, and he did not know Allied's evaluation of the other employees' work performance. Thus, Allied's evidence as to the *comparative* value of Ku's work and the other employees' work was undisputed.

Finally, Ku argues that because this was an employment discrimination action, in which "motive and intent" necessarily were in issue, the District Court could not properly decide the case without taking live testimony and assessing the demeanor of the persons involved. In other words, he contends it is never possible to decide an employment discrimination case upon summary judgment. That contention cannot possibly withstand the weight of the decades of employment discrimination cases in which the courts have entered summary judgment.

The District Court acknowledged in its opinion that summary judgment must be applied sparingly in employment discrimination cases, and the District Court considered Allied's motion with the appropriate degree of caution. (8a-9a). As the District Court noted, however, the Court of Appeals for the Fourth Circuit has squarely held that such a cautious approach does not mean that summary judgment is *never* appropriate in employment discrimination cases. (8a-9a). *See, e.g., International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1272 (4th Cir. 1981).

The District Court properly concluded that the undisputed facts were sufficient to establish that Ku could not carry his burden of proving discriminatory intent. Thus, consistent with this Court's decision in *Celotex Corp. v. Catrett*, 417 U.S. at 322-23, the District Court properly concluded that summary judgment should be granted. The Court of Appeals properly affirmed this determination. There is no need for this Court to review the matter further. Certainly there is no need for this Court to devote its resources to articulating the obvious: that summary judgment is not always inappropriate in employment discrimination cases.

2. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE STATUS OF DISCOVERY DID NOT PRECLUDE A DECISION UPON SUMMARY JUDGMENT.

Ku's Petition substantially misrepresents the status of the discovery at the time the District Court decided Allied's motion for summary judgment. But even if Ku's representation were accurate, his complaint about the District Court's handling of discovery would not raise an issue meriting this Court's review on a writ of certiorari.

On April 16, 1988, after this action had been pending for seven months and had been continued at Plaintiff's request, the District Court issued a Pre-Trial Order which established a trial date of July 27, 1988. The Order also provided that discovery must be completed and dispositive motions must be filed by June 27, 1988.

On June 20, 1988, Allied served its timely responses to Plaintiff's Third Set of Interrogatories and Plaintiff's Third Request for Production of Documents. In accordance with the Local Rules of the Eastern District of Virginia, Allied had previously served timely objections to these requests. In its response, Allied noted that the document request sought documents containing confidential, personal information about other Allied employees and documents containing confidential, proprietary information about Allied products and processes. With its response, Allied sent Ku a draft Protective Order designed to protect the confidentiality of these documents and noted that Ku need only endorse the Order and submit it to the District Court. Ten days later, Ku returned the endorsed Protective Order to Allied's counsel, who promptly tendered it to the District Court for entry. Allied did not in any way delay entry of the Protective Order, and the Protective Order did not concern any of the issues which Ku ultimately raised in a motion to compel.

In accordance with the deadline established by the Pre-Trial Order, Allied filed its motion for summary judgment on June 22, 1988. By this time, Ku had had over nine months in which to conduct discovery, and the Pre-Trial Order would not allow him to serve any further discovery requests.

On July 19, 1988, over three weeks after the discovery cutoff and just over a week before the scheduled trial date, Ku filed a motion to compel discovery. By that point, Allied's motion for summary judgment had been pending for a month, and Ku had filed a memorandum, an affidavit, and a "summary" in response to Allied's motion. In accordance with the Pre-Trial Order, Allied had filed its list of discovery materials to be used at trial and its list of potential witnesses. In short, the case finally was on the verge of trial, after months of discovery and preparation, and Allied's motion was ripe for disposition. The District Court issued its nine-page decision on Allied's motion for summary judgment the day after Ku filed his motion to compel discovery.

In deciding that the current status of discovery did not preclude ruling on Allied's motion for summary judgment, the District Court exercised its discretion, and its decision is reviewable only for abuse of discretion. *See, e.g., Gray v. Udevitz*, 656 F.2d 588, 592 (10th

Cir. 1981); *Walters v. Ocean Springs*, 626 F.2d 1317, 1320-22 (5th Cir. 1980). Ku complained to the Court of Appeals about the District Court's exercise of this discretion, and the Court of Appeals affirmed the District Court's action. The issue does not deserve any further consideration.

The facts set forth above demonstrate that the District Court did not abuse its discretion. The District Court properly concluded that Ku had had ample opportunity to conduct discovery and that his motion to compel on virtually the eve of trial should not be allowed to delay disposition of this action.[3] But in any event, this Court should not devote its precious time and efforts to a fact-specific review of whether a District Court abused its discretion in governing the conduct of discovery and pre-trial motions. This issue, too, falls far short of the standards of Sup. Ct. R. 17 as to when a writ of certiorari should be granted.

CONCLUSION

Ku's Petition utterly fails to satisfy the standard established in Sup. Ct. R. 17 as to when this Court will exercise its discretion to grant a writ of certiorari. The decisions of the lower courts were proper and do not raise any issue which justifies this Court's review. The Petition should be denied.

Respectfully submitted,
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June 15, 1989

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[3] The motion to compel was nearly incomprehensible, and it did not raise any issues meriting further delay of this action. If it were error for the District Court not to rule on this motion before ruling on Allied's motion for summary judgment, the error would be harmless.

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.